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US Wins Key Issues in WTO Softwood Lumber Appeal

WASHINGTON - The Office of the U.S. Trade Representative announced today that the World Trade Organization (WTO) Appellate Body has found in favor of the United States on key elements in a dispute between Canada and the United States on softwood lumber.

"We're extremely pleased with the outcome in this appeal. The United States used its trade remedy laws effectively in response to unfair Canadian lumber subsidies, and the WTO Appellate Body has found in our favor on the key issues. The WTO Appellate Body has upheld our determination that Canada's practices amount to an unfair subsidy, and they agreed in the key respects with the way in which we administered our trade laws in response," said USTR spokesman Richard Mills. "The United States remains committed to finding a durable solution to this 20 year dispute, but in the meantime, we will continue to use our trade laws to ensure a level playing field."

Background:

At issue were Canadian "stumpage" programs, through which Canadian provinces provide low-cost timber to Canadian lumber companies. Subsidizing lumber in this way provides an unfair advantage to those companies, contrary to the WTO Subsidy Agreement.

The Appellate Body reversed a WTO panel's finding that the U.S. Commerce Department acted inconsistently with the Subsidies Agreement when it rejected the use of private timber prices in Canada to measure the subsidy benefit. The Commerce Department rejected those prices based on evidence that they are distorted by the governments' dominant role in the timber market.

The Appellate Body also rejected Canada's claim that providing inexpensive timber did not qualify as a "financial contribution" under the Subsidies Agreement. Finally, it reversed a panel finding that the Commerce Department should have examined individual sales of subsidized lumber from one lumber manufacturer to another, to determine whether the subsidy was "passed through." The Appellate Body found only that sales of logs from one manufacturer to another should have been examined.

These findings are significant because they confirm that a WTO Member that provides low-cost inputs to specific companies cannot avoid the disciplines of the Subsidies Agreement

simply by using legal devices that relate to the form, but not the substance, of the transaction. They also confirm that countervailing duty administrators have the flexibility to accurately determine whether government prices of inputs are below market in cases where the local market price is itself distorted by government action. These are important principles that help ensure that the WTO subsidy disciplines remain meaningful, particularly with respect to natural resource inputs, such as timber.

This dispute involves an April 2002 determination by the U.S. Department of Commerce that Canadian provincial "stumpage" programs confer a countervailable subsidy on softwood lumber. Under the stumpage programs, the Canadian provinces provide low-cost timber to lumber companies, which then process the timber into softwood lumber products.

Commerce calculated a total subsidy rate of 18.79 per cent, of which 18.70 per cent was due to stumpage programs.

Canada requested consultations on May 3, 2002. The panel, established on October 1, 2002, circulated its report on August 29, 2003. The panel found that the United States acted consistently with the SCM Agreement and GATT 1994 in determining that the stumpage programs provide a "financial contribution" and that those programs were "specific" to certain enterprises, which are two prerequisites for finding a countervailable subsidy under the SCM Agreement. It also found, however, that the United States had improperly rejected private timber prices in Canada as the benchmark to calculate the extent to which the provincial governments were under-charging Canadian lumber companies for the timber, even if those prices were distorted by the government's dominance in the timber market.

Further, it found that the United States had improperly failed to conduct a "pass-through" analysis to determine whether subsidies granted to one lumber company were passed through to other lumber companies through the sale of logs or lumber. The United States appealed these two issues to the WTO Appellate Body on October 21, 2003, and Canada appealed the "financial contribution" issue on November 5. Canada did not appeal the finding with respect to "specificity."

The Dispute Settlement Body (DSB) will likely adopt the panel and Appellate Body reports in the next 60 days.

This Appellate Body report is on a wholly separate legal challenge raised by Canada than the WTO interim panel report issued on Friday, January 16. The interim panel report remains confidential until the report is finalized and circulated to WTO members.

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